

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2127

USA
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DAVID HODGE,

Appellant-Petitioner,

v.

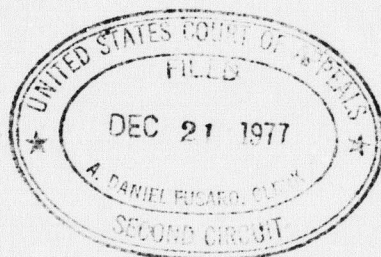
UNITED STATES OF AMERICA,

Appellee.

----- X

On Appeal from the United States District
Court for the Southern District of New York

BRIEF FOR DAVID HODGE



ROBERT A. MARGOLIN, ESQ.
Attorney for David Hodge
Box 711, 21 Redwood Lane
Smithtown, N.Y. 11787
516-724-3100

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PRELIMINARY STATEMENT

This is an appeal from Judge Morris E. Lasker's decision denying the appellant's petition for a hearing for post conviction relief pursuant to Title 18, United States Code §2255. The decision of the court was issued in the form of an "Endorsement" and filed on September 20, 1977.

The appellant is proceeding in this appeal in forma pauperis and with the assistance of counsel assigned under 18 U.S.C. §3006A. Accordingly, no appendix is being submitted and the appellant is requesting that the appeal be heard on the original record as transmitted to the Court of Appeals for the Second Circuit.

STATEMENT OF ISSUES

The factual allegations made by the appellant in his §2255 motion are sufficient to at least merit the holding of a hearing on the issues he raises.

STATEMENT OF CASE

I. Nature of Case:

The appellant, David Hodge, and a co-defendant,

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Morgan Holmes, were indicted and tried for the alleged commission of armed bank robberies

II. Course of Proceedings and Dispositions Below:

David Hodge and his co-defendant were tried by a jury on October 31 and November 1 of 1973, before then District Court Judge Murray I. Gurfein. (Docket No. S73 Cr. 849). The trial was proceeded by suppression hearings in which physical evidence and statements were sought to be suppressed. After these hearings, on October 29 and 30, 1973, the motions to suppress were denied.

The trial ended in guilty verdicts and on November 30, 1973, Hodge was sentenced to the 15 year sentence he is currently serving.

At these proceedings, Hodge was represented by court appointed counsel, Richard G. Rosenbaum; his co-defendant was represented by Ronald Wohl, Esq.

Hodge appealed his conviction; the conviction was affirmed.

Hodge then brought this \$2255 motion. (Docket No. 76 Civ. 2122). In this motion, Hodge raised two issues which were not raised on the prior appeal: First, he claimed that he was denied his constitutional right to proceed pro se; and second, he said he was denied the effective

assistance of counsel at the hearings and trial. The motion was denied in both respects by Judge Lasker.

STATEMENT OF FACTS

Between the time of Hodge's arraignment and the commencement of the hearings and trial, his court appointed attorney, Mr. Rosenbaum, interviewed him on three occasions. Each session lasted about ten minutes. (See Hodge's affidavit accompanying his brief in the §2255 motion before Judge Lasker, paragraphs 2 and 3; and see Rosenbaum's accompanying affidavit, paragraph 2).

On these occasions, Mr. Rosenbaum never asked Hodge about the facts and circumstances surrounding his arrest, the seizure of evidence at the time of arrest, nor of the statements made at FBI headquarters. (Hodge's affidavit, paragraphs 4 and 11; Rosenbaum's affidavit, paragraph 3).

Mr. Rosenbaum did discuss, however, the advisability of plea bargaining, Hodge's drug history and how to recover money belonging to Hodge confiscated by the FBI agents. (Hodge's affidavit, paragraph 3).

Hodge asked Mr. Rosenbaum to speak to his wife, mother-in-law and brother-in-law. To Hodge's knowledge, based on his discussions with these relatives, Mr. Rosen-

baum never contacted them.

At the hearings, Hodge complained about Mr. Rosenbaum's inexperience and, in fact, Hodge's trial was one of Mr. Rosenbaum's first criminal trials. Judge Gurfein, aware of Mr. Rosenbaum's inexperience and of Hodge's complaints, said, during a robing room conference:

...for the protection of the record and of Hodge and of his counsel, I will intervene a little more than I would normally do . . .

(Trial transcript, page 96).

Mr. Rosenbaum participated in these hearings without being aware of Hodge's version of the facts and circumstances surrounding his arrest, the seizures and his statements. In fact, it was not until Hodge's sentencing that Hodge had a chance to make known his version to the court. (Trial transcript, pages 537 et seq.).

At the hearings, Hodge did not take the stand. At that time, Hodge was not aware he could testify at the suppression hearings. It was not until his co-defendant took the stand at his own suppression hearing (which immediately followed Hodge's hearings) that Hodge realized he could have taken the stand to give his version. (Hodge's affidavit, paragraph 14; trial transcript, page 537). When

the co-defendant took the stand, Hodge immediately confronted Mr. Rosenbaum with his revelation that he could have taken the stand and told Mr. Rosenbaum that he wanted the court to hear his version. Without then making any effort to learn Hodge's version, Mr. Rosenbaum refused to let him testify. (Hodge's affidavit, paragraph 14; trial transcript, page 544).

Hodge's version of what occurred at his arrest and his subsequent interrogation differs significantly from the versions given by the agents. ^{*} The trial judge, Judge Gurfein, did not have the benefit of Hodge's version and understandably denied the motions to suppress. If Hodge had testified and if his wife, mother-in-law and brother-in-law had testified (they were present at various times during Hodge's arrest and the search and seizures), the trial court would have been presented with a significant conflict in testimony vis-a-vis the agents.

In brief, the agents claim to have been allowed into the apartment by Hodge who was immediately handcuffed and seated in the parlor of his apartment. Then, the first

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In Judge Lasker's Endorsement, supra, he commented on the factual differences as follows: "... the discrepancy is marginal and certainly not enough to meet the heavy burden necessary to show failure of adequate representation." (P. 2).

of two searches began. This first search was for possible "fugitives" who might be lurking in the apartment (Trial transcript, page 15); no evidence was seized during this search (and no fugitives were found).

The second search was more a seizure than a search. According to the agents, Hodge, clad only in his undershorts, requested some pants. An agent was directed to a bedroom where he saw a pair of pants which he grabbed and searched, allegedly for security reasons, and gave to Hodge. In searching the pants, the agent discovered what turned out to be "bait money" which was from a bank robbery attributed to Hodge.

After this, Hodge's wife went to get him a shirt and was accompanied in this task by an agent. When the wife went to the closet for a shirt, the agent then saw what he recognized to be shirts allegedly worn by Hodge in the course of some of the bank robberies. At that point, the agent seized those shirts. (Trial transcript, pages 5-22).

Hodge's version significantly differs from the agents'. According to Hodge, the agents did not search once, only for fugitives, and then subsequently seize evidentiary items as described above. Instead, the agents searched and seized at one time. After Hodge was seated in the parlor, the agents went through the entire apartment and,

in the course of six or seven minutes, came up with the allegedly incriminating clothes, money and other items. It was not until after this search and seizure that Hodge asked his wife to get him some clothes and she did. (Hodge's affidavit, paragraphs 7 and 8). Nothing further was seized at that time. (Trial transcript, page 437).

Hodge also has a different version of the events at FBI headquarters. Briefly, the agents make note of the Waiver of Rights which Hodge signed. Hodge claims that he signed that form because it was handed to him soon after he requested an attorney and because he was led to believe that it was a form to allow him to get an attorney. Thinking this, he signed it without reading it. (Hodge's affidavit, paragraph 10; trial transcript, page 539).

At Hodge's trial, the evidence against him included photographs (from bank security cameras), in court identifications, shirts and pants (allegedly worn in the course of bank robberies), bait money (recovered along with the clothes in Hodge's apartment), fingerprints and inculpatory statements by Hodge himself.

ARGUMENT

Introductory Remarks:

The evidence mentioned above does seem over-

whelming. Not only did the jury think so, but apparently Hodge's then inexperienced attorney, Mr. Rosenbaum, thought so too. Facing that kind of evidence, Mr. Rosenbaum understandably, though not excusably, never inquired into the possible defenses and arguments which existed as to the search, seizure and the statements. Instead, he discussed plea bargaining with the defendant.

As a result of being overwhelmed, coupled with his inexperience, Mr. Rosenbaum did not provide effective assistance of counsel to Hodge. Armed with the knowledge of Hodge's version, the cross-examinations of the agents, at the hearings and trial, would have taken on new dimensions. And at the hearings, if allowed to testify, Hodge and his witnesses would have given further effect and credence to his attack on the agents' testimony.

If the trial court believed Hodge and his witnesses it would have been justified in finding that the apartment search was unlawful as being beyond the bounds of a permissible warrantless search and beyond the scope of a search incident to a lawful arrest; and the court would have been justified in finding that Hodge's statements were made without a voluntary waiver of his rights.

A trial without any or all these evidentiary items would certainly have diminished the Government's case. It

is, of course, only conjecture as to whether the outcome would have been different or not, but it is not a matter of conjecture that with these items in evidence, when added to the rest of the Government's case, the evidence against Hodge became monumental.

Nor was the decision not to have Hodge and his witnesses take the stand a tactical decision. To be tactical, the decision would have to have been based upon the attorney's knowledge of the alternatives. Mr. Rosenbaum, for whatever reasons, never knew the alternatives because he never knew Hodge's version and he never interviewed the persons referred to him by Hodge. By this neglect on Mr. Rosenbaum's part, Hodge was deprived of putting forth a meaningful defense and was thus deprived of a fair trial. In fact, the trial that ensued resembled more closely an inquest or a going-through-the-motion than an actual trial. This would not have been so if Hodge's suppression motions had been granted; and his motions would have been granted only if he and/or his witnesses had testified.

Point I

THE APPELLANT, DAVID HODGE, SHOULD
BE GRANTED A HEARING ON HIS \$2255
MOTION BECAUSE HIS ALLEGATIONS WITH
REGARD TO THE INEFFECTIVE ASSISTANCE
OF COUNSEL IN THE TRIAL BELOW ARE
SUFFICIENT ON THEIR FACE TO ENTITLE
HIM TO RELIEF.

The assistance of the court appointed attorney at Hodge's trial was ineffective and, as a result of that ineffectiveness, Hodge was frustrated from presenting his claims as to the unreasonable search and the involuntary waiver of rights. This combination of ineffective assistance of counsel plus the frustration of the presentation of his claims and defenses is sufficient to afford Hodge the relief he seeks in this motion, or, at least, to afford him a hearing in regard to these matters. See Thornton v. United States, 368 F.2d 822, 829 (D.C.Cir.1966); see Bruce v. United States, 379 F.2d 113, 116-117 (D.C.Cir.1967).

The language contained within section 2255 supplies the test for the granting of a hearing. A prompt hearing is to be granted to a petitioner to,

. . . determine the issues and make findings of fact and conclusions of law with respect thereto [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . .

18 U.S.C. §2255; United States v. Thomas, 291 F.2d 478 (6th Cir.1961).

In Hodge's petition, as has been discussed previously, factual allegations are made which should entitle

him to a hearing. In light of these allegations, it cannot be said that "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."

Moreover, the Second Circuit ". . . takes a dim view of any summary rejection of a petition for postconviction relief when supported by a 'sufficient affidavit.'" Dalli v. United States, 491 F.2d 758, 760 (2d Cir.1974). *

Hodge's petition is sufficient to warrant a hearing. This is particularly so when one realizes that Hodge's allegations must be considered as true in reviewing the denial of a §2255 motion. United States v. Sturm, 180 F.2d 413, 414 (7th Cir.), cert. denied, 339 U.S. 986 (1950); Taylor v. United States, 238 F.2d 409, 413 (9th Cir.1956), cert. denied, 353 U.S. 938 (1957).

If factual issues are raised by a §2255 motion and if these facts, taken as true, would entitle the petitioner to relief, then a hearing is required. United States v. Lee, 500 F.2d 586, 587 (8th Cir.), cert. denied, 419 U.S. 1003 (1974); Williams v. United States, 481 F.2d 339, 346

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The court in Dalli went on to say, however, that where a supporting affidavit is insufficient on its face to warrant a hearing, ". . . we have . . . recognized that a judge is well within his discretion in denying a petition [without a hearing]. . . ." Id.

(2d Cir.), cert. denied, 414 U.S. 1010 (1973); Forrester v. United States, 456 F.2d 905 (5th Cir.), cert. denied, 409 U.S. 856 (1972); United States v. Hall, 163 F.Supp. 684, 686 (E.D.N.Y.1958).

Hodge does make factual allegations as to the ineffectiveness of his trial counsel. As previously noted, Hodge's allegations with regard to the facts and circumstances surrounding his arrest, the seizure of physical evidence and the taking of his statement, if taken as true, would have been persuasive, if not dispositive, in his suppression hearings. Thus, in reviewing the papers in support of Hodge's §2255 motion, as well as the files and records of the case, it cannot be said that the motion is conclusively determined against Hodge so that not even a hearing on his allegations is warranted. See Hanger v. United States, 428 F.2d 746,749 (8th Cir.), cert. denied, 400 U.S. 1022 (1970); United States v. Trumblay, 256 F.2d 615, 617 (7th Cir.1958), cert. denied, 358 U.S. 947 (1959); Malone v. United States, 299 F.2d 254, 255-256 (6th Cir.), cert. denied, 371 U.S. 863 (1962).

In United States v. Haywood, 464 F.2d 756 (D.C. Cir.1972), the defendant petitioned for relief pursuant to §2255. As Hodge is doing here, the defendant there made allegations regarding the ineffective assistance of counsel

and he questioned the propriety of a search and seizure. Haywood's petition was denied without a hearing. In reversing and remanding for a hearing, the court noted that,

The motion [in regard to the inadequacy of counsel] , including particularly those with respect to the search and seizure, and consequent admission at trial of the fruits thereof, preclude denial of the motion without a hearing, for the motion, files and record do not conclusively show that appellant was entitled to no relief.

Id. at 763.

In addition to the Haywood case, another case analogous to the instant case is Moore v. United States, 432 F.2d 730 (3d Cir.1970). Moore is another case in which a petitioner claimed ineffective assistance of counsel and had his claim denied by the district court without a hearing. As in Haywood, and as in the instant case, it was ". . . not possible to say . . ." that the motion, files and records conclusively showed the petitioner was not entitled to relief. Accordingly, the court remanded for a hearing. Id. at 739.

Hodge's allegations show that due to the inactions of his trial counsel, he was frustrated from presenting his side of the story at the suppression hearings. In Thornton

v. United States, supra 368 F.2d, the denial of a \$2255 motion based upon ineffective assistance of counsel was affirmed because there was no showing that the petitioner-appellant ". . . was frustrated from presentation of the claim of unreasonable search or seizure at or before trial." Id. at 829.

The converse is true in Hodge's case; he does show a frustrated set of circumstances. Accordingly, reasoning from the Thornton case would lead to and reinforce the conclusion based upon the cases already cited, to wit: A hearing is called for to resolve Hodge's allegations.

In Jones v. Huff, 152 F.2d 14 (D.C.Cir.1945), a prisoner made a \$2255 motion based upon the incompetence of his trial counsel and the motion was denied without a hearing. In that case, the prisoner alleged in his petition that his trial attorney was incompetent because there was a coerced statement in existence which his attorney knew of; that he gave the names and addresses of witnesses to his trial attorney who then refused to call them; and that there was a request made for a handwriting expert which his attorney never followed through on. On the appeal, the district court was reversed and the matter was remanded for a hearing. Judge Prettyman, writing for the majority, noted that the key consideration in these matters is,

. . . whether the allegations of this petition, if taken as true, show that the proceedings upon the trial "were a farce and a mockery of justice."

Id. at 15.

Judge Prettyman went on to say that if the allegations of the prisoner were true, then there was a "total failure to present the cause of the accused in any fundamental respect." Id.

David Hodge's allegations in support of this motion are similar to those made in the Jones case. Again, Hodge complains about the incompetency of his trial attorney, the existence of an unconstitutionally obtained statement and, in addition, unconstitutionally seized evidence. Hodge also gave his attorney the names and addresses of witnesses who were never contacted by that attorney. Unlike the Jones case, however, where the attorney knew of the existence of the coerced statement, Hodge's attorney never knew (because he never asked) about the unconstitutionally obtained statement and evidence.

In Jones, it could at least be argued that since the attorney knew of his client's contentions, his omissions in acting upon them were the result of tactics or other reasoned considerations. But in David Hodge's case, there is no possibility of a tactical consideration forming the basis of his attorney's omissions. His attorney never asked him the basic, fundamental questions which are crucial

where statements are obtained from a defendant or evidence is seized incident to a defendant's arrest. Attacking the seizure of evidence and the waiver of rights was fundamental to David Hodge's case. And even though there were suppression hearings covering these areas, these hearings were nothing more than a "farce and mockery of justice" because Hodge's attorney never knew Hodge's version and never inquired about it.

Thus, the trial representation afforded David Hodge was below the standard level of attorneys' services and his trial attorney's efforts were "so incompetent as to deprive his client of a trial in any real sense" Mitchell v. United States, 259 F.2d 787, 793 (2d Cir.), cert. denied, 358 U.S. 850 (1958); Frاند v. United States, 301 F.2d 102 (10th Cir.1962).

The prejudice to David Hodge, which resulted from his trial attorney's incompetence, consisted of a one sided suppression hearing in which Hodge's version was not introduced by direct testimony nor utilized in cross examining the Government agents; and, a one sided trial in which, from the prosecutor's point of view, every imaginable bit of evidence and every possible link in the chain of guilt was available and introduced into evidence. If David Hodge had proper assistance of counsel, at the very least his version of the relevant incidents would have been ascertained by

that counsel, utilized in cross examining the Government's witnesses at the pre-trial hearings and presented in direct testimony at those hearings. Then, believing the testimony of David Hodge and his three potential witnesses, the likelihood is that the court would have suppressed several significant evidentiary items and his statement; the evidence at trial would not have been so overwhelming; and, room for reasonable doubt would have existed.

The fruits of the search and seizure and the statement were relevant and material to the issues at trial. These fruits were not only damaging in themselves but reinforced the other evidence. Thus, if Hodge's allegations were to be accepted by the district court after a hearing, Hodge would be entitled to relief. United States v. Haywood, supra 464 F.2d at 760.

At most, Hodge is entitled to relief here; at least, his allegations raise questions about the adequacy of his trial counsel and the resulting fairness of the trial received.

The fact that conjecture exists here is further evidence of the unfairness of the trial below resulting from the ineffective and incompetent assistance afforded by Hodge's trial attorney. If the assistance of counsel and the trial itself were properly conducted and fair, then

there would be no room for conjecture at all.

David Hodge should be afforded a hearing on this motion. In situations such as this, it has been held that where questions are raised,

. . . as to whether the accused had either the effective assistance of counsel or a trial in any real sense. [Then, improbable as they may be, petitioner] had the right to support them by evidence.

Frاند v. United States, 289 F.2d 693 (10th Cir.1961) [same case as cited earlier in 301 F.2d].

Whether the granting of the suppression motions would have or will make a difference in the trial's outcome is hard to predict. But at least one thing is clear: Hodge was deprived of the protections afforded to him under our constitution with regard to the effective assistance of counsel and with regard to the search and seizure. This being the case, the remarks at the close of the Haywood case become glaringly appropriate here:

[The key question then becomes] whether appellant's conviction rests in part upon denial of a constitutional protection afforded by either the Fourth or Sixth Amendment. If so, it cannot stand. Fay v. O'Neil, 372 U.S. at 402 . . .

Supra 464 F.2d at 763.

CONCLUSION

Petitioner-appellant, David Hodge, should be granted a hearing.

Respectfully submitted,

ROBERT A. MARGOLIN, Esq.
Box 711, 21 Redwood Lane
Smithtown, New York 11787
516-724-3100

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9-23-77
2.A.M.

ENDORSEMENT

DAVID HODGE, Petitioner, v. UNITED STATES, Respondent.
76 Civ. 2122

LASKER, D.J.

David Hodge, who is presently serving a fifteen year sentence for bank robbery and use of a dangerous weapon, petitions for a hearing for post conviction relief pursuant to Title 28, United States Code §2255. He alleges that he was denied his constitutional right to proceed pro se and the effective assistance of counsel at trial. The petition is denied.

Hodge did not request to represent himself at trial. He did on several occasions express dissatisfaction with his court appointed attorney. (Trial Transcript at 3, 4, 44 and 537). A demand to dismiss an attorney is not, however, equivalent to a request to proceed pro se. Such a request must be clearly stated in order to avoid giving a defendant an unjustified opportunity to upset ^{an} adverse verdict after trial. United States v. Gutterman, 147 F. 2d 540 (2d Cir. 1945). Hodge states that he was unaware of his right to represent himself and, citing Faretta v. California, 422 U.S. 806 (1975) for the existence of this right, argues that the trial judge was required to advise him of it. The rule in this circuit is that a trial judge is not obliged to inform the defendant of his right to represent himself. United States v. Clausell, 389 F. 2d 34, 35 (2d Cir. 1968), United States ex rel. Maldonado v. Denno, 348 F. 2d 12, 15-16 (2d Cir. 1965). This rule has not been reconsidered by the Second Circuit following the holding of Faretta. Even if the rule should be changed, it is unlikely that such a decision would be given retroactive effect since this would subject the proceedings in countless criminal cases to reexamination.

Petitioner also alleges that he was denied effective assistance of counsel. On two occasions during the trial Judge Gurfein expressly noted that he found defense counsel's performance to be satisfactory. (Trial Transcript at 5 and 543). Because petitioner failed to raise the point on appeal, the appellate court did not rule on the issue. Nevertheless,

Hodge now claims that his trial attorney's alleged incompetence was prejudicial at a suppression hearing in two respects: he failed to present petitioner's account of the circumstances surrounding seizure of evidence upon petitioner's arrest and statements by petitioner made in detention, and he refused to allow his client to testify at trial.

We have examined carefully both the transcripts of the suppression hearing and the trial. While there are differences between the facts described by Hodge in his brief and the facts presented by his attorney at the suppression hearing and the trial, the discrepancy is marginal and certainly not enough to meet the heavy burden necessary to show failure of adequate representation. The transcript of the suppression hearing indicates that petitioner's attorney made a fully adequate investigation into the manner in which items were seized from Hodge's home and statements were taken from him at F.B.I. headquarters. In no respect was the presentation "so incompetent as to deprive his client of a trial in any real sense..." Mitchell v. United States, 259 F. 2d 787, 793 (2d Cir. 1958), cert. denied, 358 U.S. 850 (1958). United States v. Yanishefsky, 500 F. 2d 1327 (2d Cir. 1974), United States v. Vincent, 496 F. 2d 641 (2d Cir. 1974). The decision that Hodge should not take the stand was a reasonable exercise of a trial attorney's discretion to determine the best manner of presenting his client's case. See Ennis v. Le Vre, Docket No. 76-2155 (2d Cir., Aug. 9, 1977). This attorney may well have concluded that the testimony of Hodge, a drug addict with a record of prior criminal convictions, would not be believed by the court which tried the facts.

The petition is denied.

It is so ordered.

Dated: New York, New York
September 19, 1977

MORRIS E. LASKER

U.S.D.J.

FILED 9-20-77